Children's Court of NSW Resource Handbook — Articles and other resources

Doli incapax — the criminal responsibility of children[1]

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The wisdom of protecting young children against the full rigour of the law is beyond argument. The difficulty lies in determining when and under what circumstances should it be removed.[4]

Marge Simpson: Well, I'm just relieved that Homer's safe and that you've recovered and that we can all get back to normal. If Maggie could talk I'm sure she'd apologise for shooting you.

Montgomery Burns: I'm afraid that's insufficient. Officer, arrest the baby!

Chief Wiggum: Hah. Yeah, right, pops. No jury in the world's going to convict a baby. Mmm ... maybe Texas.[5]

Smithers: That Simpson's boy is looking at 180 years.

Montgomery Burns: Thank God we live in a country so hysterical over crime that a ten-year-old child can be tried as an adult.[6]

[12-1000] The age of criminal responsibility

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In NSW, s 5 of the *Children (Criminal Proceedings) Act* 1987 provides that a child under the age of 10 years cannot commit an offence. This statutory presumption is irrebuttable.

The common law presumes that a child between the age of 10 and 14 years does not possess the necessary knowledge to have criminal intention, that is, the child is incapable of committing a crime due to a lack of understanding of the difference between right and wrong. This is the common law presumption of doli incapax.

The presumption of doli incapax is a presumption that can be rebutted by the prosecution calling evidence. In addition to proving the elements of the offence, the onus is on the prosecution to prove beyond reasonable doubt that the child knew that what they did was seriously wrong, as distinct from mere mischief.

The existence of the presumption of doli incapax in the common law was recently affirmed in *RP v The Queen* (2016) 259 CLR 641 (*RP*).

The defence and prosecution should consider doli incapax in all cases involving children under the age of 14.

The test for rebutting doli incapax

RP v The Queen (2016) 259 CLR 641

Following a judge-alone trial, RP was convicted of two counts of sexual intercourse with a child under the age of ten years. The accused was aged approximately 11 and a half years old at the time. The complainant was the accused's younger brother.

The sole issue for the trial judge's determination was whether the prosecution had rebutted the presumption that the appellant was doli incapax. The trial judge was satisfied that it was proven beyond reasonable doubt that the appellant knew his conduct was seriously wrong.

In short, the first offence occurred in circumstances where there were no adults present. The appellant grabbed the complainant, held him down, put his hand over the complainant's mouth and committed the conduct constituting the offences. The intercourse stopped when an adult returned to the house. The appellant told the complainant not to say anything. The second offence, later in time, involved similar circumstances.

There was evidence that, when the appellant was older (aged 17 or 18) that he was assessed as being in the borderline disabled range of intellectual functioning.

The trial judge, in considering the circumstances surrounding the offence, found that the presumption was rebutted in relation to the first offence and that it followed the presumption was rebutted in relation to the second.[7]

The Court of Criminal Appeal dismissed the appellant's appeal. The appellant appealed to the High Court.

The High Court (Kiefel, Bell, Gageler, Keane and Gordon JJ presiding) held that the convictions should be quashed, and verdicts of acquittal should be entered, on the ground that it was not open to conclude that the accused was proven beyond a reasonable doubt to have understood that his conduct was seriously wrong in the moral sense. In the absence of evidence with respect to the environment in which the appellant was raised or from which a conclusion could be drawn as to his moral development, it was not open to conclude that he understood his conduct to be seriously wrong, the plurality noting (per Kiefel, Bell, Keane and Gordon JJ at [9], [12]):

> [To rebut the presumption of doli incapax,] the prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was seriously wrong in a moral sense to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised.
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> ...
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> What suffices to rebut the presumption will vary according to the nature of the allegation and the child.

The test developed from RP

A number of principles can be derived from *RP*, as follows:

- the prosecution must rebut the presumption of doli incapax as an element of the prosecution case
- proof requires that the child appreciated the moral wrongness of the alleged offence, as opposed to being aware that the conduct was merely naughty
- the evidence to prove guilt must be clear and beyond all doubt and contradiction, and
- the evidence is not mere proof that the child did the act charged, however horrifying or obviously wrong the act may be.

Each of these are dealt with, below.

The onus on the prosecution

The prosecution bears the onus and must prove, beyond reasonable doubt, that the presumption does not apply. There is no onus on the young person to adduce evidence that the presumption applies. If at the end of the prosecution case, no evidence has been called to rebut the presumption, the prosecution has not discharged their onus and there may be no case to answer.

Proof of moral wrongness

The prosecution must prove, again beyond reasonable doubt, that the child knew that what they were doing was seriously wrong (as opposed to merely naughty or mischievous).

It cannot be presumed that a child understands that what they are doing is seriously wrong just because, for example, the complainant may appear like they are not consenting to a sexual act, or because they appear distressed.[8]

A child's acknowledgment, after the offending, that they understood that an act was seriously wrong is not proof in and of itself that the child appreciated the moral wrongness of the alleged offending. This is particularly important if the prosecution rely upon admissions by a child, at the police station, after arrest. It may be that, by that stage, the child has appreciated the serious wrongness of their actions, having been arrested and confronted with questions by a police officer, but not necessarily at the time that the alleged offences were committed.

In *BC v R* [2019] NSWCCA 111 (*BC*), the appellant had guilty verdicts returned against him (two weeks before the High Court handed down its decision in *RP*). *BC* concerned historical allegations of sexual assaults. The evidence adduced by the Crown pointed to three circumstances in the offending that were said to rebut the presumption (at [45]):

(a) the complainant was only 5 or 6 years old

(b) when the appellant heard an adult moving around the house he said "quickly, stop, stop", and

(c)

> The appellant said words to the effect of "you can't tell anyone what just happened or else the [complainant] would get in trouble".

The Crown did not adduce evidence as to the child's education or environment.

In applying *RP*, Leeming JA, Ierace J, and Hidden AJ held (at [50]–[51]):

> We have come to the view, contrary to that of the primary judge, that the Crown failed to adduce evidence capable of satisfying the jury to the criminal standard that the doli incapax presumption had been rebutted. We accept the applicant's submission that, in the absence of any evidence concerning the applicant's contemporaneous maturity or intelligence, the applicant's age relative to K's carries little to no weight in rebutting the presumption …
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> In light of the Crown's decision not to adduce evidence concerning the applicant's maturity or character, the bare fact of the applicant's age (which itself remains subject to some uncertainty) carries little weight in assessing his understanding of the degree to which his actions transgressed ordinary standards of morality.

The court accepted that the circumstances of the offending could rebut the presumption of doli incapax, but that the evidence adduced by the Crown was insufficient to do so (at [54]). The words "quickly, stop, stop" were consistent with avoiding detection from an adult and were consistent with an understanding of the appellant's actions were merely naughty or mischievous. The warning that the complainant would get into trouble was indicative of the appellant being afraid of getting into trouble himself but said little about the appellant's understanding of the moral wrongfulness of his actions.

Evidence strong and clear beyond all doubt or contradiction

The evidence the prosecution relies upon must be clear evidence that the defendant knew that his or her actions were wrong and not just naughty. If the evidence is ambiguous then it is not sufficient to rebut the presumption.

In *RP*, apart from evidence of the alleged offences themselves, the only evidence of the appellant's capacity was contained in reports addressed to the appellant's intellectual capacity when he was older (17 and 18 years), in relation to different issues. This was insufficient to rebut the presumption.

In *C v DPP*,[9] the appellant was aged 12 and was seen by police officers using a crowbar to tamper with a motorcycle in a private driveway. The appellant ran away but was caught and arrested. The appellant was initially convicted. The Magistrate inferred from the fact that he ran away that he knew that what he had done was wrong. The House of Lords held that flight from scene can as easily follow a naughty action as a wicked one. In such circumstances the House of Lords were left with no option other than to find that the presumption had not been rebutted by the prosecution evidence:[10]

> Running away is usually equivocal … because flight from a scene can as easily follow a naughty action as a wicked one.

However, the House of Lords did go on to say that there may be a few cases where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness:[11]

> An example might be selling drugs at a street corner and fleeing at the sight of a policeman.

The evidence is not mere proof that the child did the act charged, however horrifying or obviously wrong the act may be

The act itself cannot be used as evidence to rebut doli. In *RP*, the plurality said:[12]

> No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts. To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* suggests a contrary approach, it is wrong. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised. [citations omitted.]

Similarly, in *DK v Maurice Rooney*[13] the defendant was 12 years old who was charged with committing an offence contrary to s 66C of the *Crimes Act* 1900 (sexual intercourse of a child between the ages of 10 and 16) while in juvenile detention at Reiby. On appeal the Magistrate was held to be wrong at law when he suggested that the act of sexual intercourse, without consent, was so "irretrievably wrong" and so "intrinsically bad" that the court could presume that the child should have known "that what he was doing was wrong". Justice McInerney held that the child's acts constituting the elements of the offence are not evidence of knowledge that the act was wrong. The act itself cannot be relied upon to rebut doli incapax; however, evidence may be adduced by the prosecution regarding the surrounding circumstances attending the act, the manner in which it was done, and evidence as to the nature and disposition of the child.

The erroneous presumption of normality

In attempting to rebut the presumption of doli incapax it is often argued that a "normal" child of "that" age must have known that what it was doing was seriously wrong. Thomas Crofts in his article "Rebutting the presumption of doli incapax",[14] refers to this as the so-called presumption of normality.

Crofts argues that this "presumption of normality" is erroneous ignores the requirement that the prosecution is required to bring positive proof that the child in question has the requisite knowledge. It is not sufficient to simply argue that other children of this age would have known it was seriously wrong. The prosecution must prove beyond a reasonable doubt that *this* child knew that *this* offence was seriously wrong and not just naughty. The rebuttable presumption acknowledges that children do not develop at the same rate.

In *RP*, it was noted at [12]:

> The only presumption which the law makes in the case of child defendants is that those aged under 14 are doli incapax. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.

Rebutting the presumption of doli incapax

The prosecution may rely on various forms of evidence to rebut the presumption, including:

- statements/admissions made by the child
- behaviour of the child before and after the act
- prior criminal history
- evidence of parents/home background
- evidence of teachers, and
- evidence of psychologists and psychiatrists.

Statements/admissions made by the child

An admission made by a child will often be sufficient to rebut doli incapax. Thomas Crofts[15] argues:

> It has been established that an important source of information for assessing a child's appreciation of the seriousness of the act is what the child says when interviewed by the police. This type of evidence is preferable in as far as it refers directly to a child's appreciation of the act itself and is not drawn from a general analysis of the behaviour and personality of the child.

The classic Australian case on point is the Victorian case of *R (a child) v Whitty*.[16] In this case a child was arrested for shoplifting and when interviewed by police regarding the offence used the words, "I stole" (the goods). It was held that the use of these words was evidence of mischievous discretion. The child's language was interpreted to indicate knowledge that the act of stealing was wrong, perhaps in contrast to the words "I took".

However, before an alleged admission could be used as evidence to rebut the presumption of doli incapax, the usual questions relating to the admissibility of such evidence must be considered. Additionally, if admitted is the admission indicative of the child's understanding *at the time of the offence*.

Despite the additional obligations placed on the prosecution to rebut doli incapax, a child is still entitled to rely on his or her right to silence. A child under 14 should be advised of the additional dangers of making a record of interview including that if the child elects to make a record of interview,

the investigating police are likely to ask questions with the specific intention of rebutting doli incapax.

A child should not be put into any worse position than an adult offender and is entitled to attempt to exclude otherwise inadmissible admissions. A quick checklist includes:

(a) are the admissions caught by s 13 of the *Children (Criminal Proceedings) Act* 1987?

(b) did the child receive legal advice from the Legal Aid Youth Hotline (and/or some other source)?

(c) are the admissions admissible under Pt 3.4 of the *Evidence Act*?

(d) should the admission be excluded under ss 90, 135, 137 or s 138 of the *Evidence Act*?

(e) is the admission caught by s 281 of the *Criminal Procedure Act*?

Particular attention should be given to the circumstances surrounding the admission. For example, does it occur after arrest at a time when it is clear to the child that what they are alleged to have done was seriously wrong? Does it occur in response to leading or closed questions put to the child by police? If the admission is made in response to questioning, does the child appear to otherwise be particularly suggestible?

Another question that must be considered is, are the words attributed to the child "clear beyond all doubt or contradiction"? The alleged admissions must show that the child understood that his actions were seriously wrong and not just naughty. If the admissions are equivocal, or ambiguous, then it can be argued that the prosecution has not successfully rebutted the presumption.

In *IPH v Chief Constable of South Wales*,[17] an 11-year-old boy was convicted of criminal damage to a van. The van's windows were smashed, the paint work was scratched, and the van was pushed into a pole. The child was interviewed by police. During the interview, the child said, "Yeah, I knew I would damage the truck by pushing it into the pole". On appeal, the Divisional Court said that the admission proved that the child knew that damage would result from the action. The admission did not prove knowledge that the action was seriously wrong as opposed to mischievous or naughty.

Consideration must also be given as to whether the admissions indicate the child's understanding at the time of the alleged offence. The child's intention must be assessed at the time of committing the offence. Any statements given by a child after the offence may have been tainted or affected by the process. It is arguable that since being arrested, taken to a police station and placed in a dock the child has come to an appreciation that he or she has done something wrong. This understanding may not have been consistent with the child's state of mind at the time of the alleged offence.

In *AL v R* (2017) 266 A Crim R 1 (*AL*), the appellant was tried for historical sexual offences when the defendant was aged between 12 and 13 years and the complainant was aged between 4 and 5 years old. The charges were brought some 14 years after the offending took place. On appeal, the applicant submitted that the trial judge fell into error by failing to adequately address the jury on the question of doli incapax and that the evidence adduced at trial fell short of proof of the applicant's knowledge of the serious wrongness of the act charged. The applicant contended that in light of *RP* the trial judge should have directed the jury to place little or no weight on the applicant's evidence in cross-examination.

Crown: I suppose, you would have known when you were 12 or 13 that it would have been seriously wrong to put your penis into a young boy's mouth, wouldn't you?

AL: I suppose I would have, yes.

There was also evidence suggesting the appellant was a good student at school at the time of the offending.

The Court of Criminal Appeal held that on the totality of the evidence, the evidence was sufficient to prove the knowledge of serious wrongness beyond a reasonable doubt. The court stated:[18]

> Although the applicant places heavy reliance on the outcome in *RP v The Queen*, that was a case that very much turned on its own facts. We do not understand it to have changed or developed relevant principle

The court distinguished the facts of *AL* from *RP*, taking note of the evidence suggesting the appellant's good performance as a student and lack of disadvantage. The court in *AL* held that the evidence adduced from cross-examination was not inadmissible, his recollection of his contemporaneous understanding of serious wrongness was relevant and the jury could give weight to that evidence.

Behaviour of the child before and after the act

While evidence of the act itself, no matter how horrifying, cannot be relied upon, evidence of the child's behaviour before, after and going to the surrounding circumstances of the offence may be admissible.

In *KG v Firth* [2019] NTCA 5, the appellant appealed a decision of the Northern Territory Supreme Court to overturn the decision of the Youth Justice Court that the appellant lacked mental capacity to be held criminally liable under s 43AQ of the *Criminal Code* (NT). In that case, the appellant was 13 years old, he suffered significant intellectual disability, he suffered from Foetal Alcohol Spectrum Disorder, he was raised in dysfunctional and transient home environments, he suffered trauma from a young age including exposure to domestic and sexual violence.

The Court of Appeal articulated the categories of evidence relevant to the question of doli incapax at [27], being:

- any admissions made by the appellant
- the nature of the alleged conduct (subject to the qualification that the presumption cannot be rebutted merely as an inference from the doing of the act)
- the circumstances surrounding the conduct, including any attempts at concealment or escape, and
- the appellant's background, including his education, upbringing, mental capacity and any previous criminal convictions.

The Court of Appeal made a number of comments clarifying *RP* including that the rebuttal of the presumption does not require, in every case, the demonstration of knowledge of wrongness in a police interview, or evidence concerning the child's social, medical and educational circumstances.

[19] Significant weight will ordinarily be given to the child's psychologists views as to the ability to understanding right from wrong.[20]

Prior criminal history

In some circumstances, the prior criminal history will be admissible to rebut doli incapax. Evidence of prior convictions, cautions or youth justice conferences may be admissible to demonstrate that the child has been in contact with the criminal justice system and has been told by the police or courts that those types of actions are criminally wrong.

However, the mere presence of a criminal history is not conclusive evidence. A child who has a criminal history is not precluded from raising doli incapax as an issue at a hearing for a later offence. A prior charge of assault does not necessarily mean that a child will have an understanding of the offence of goods in custody.

The elements of the offence and the complexity of the charge should also be carefully considered. In circumstances where the prosecution relies on complicity, common purpose, or omissions, there may be scope to argue the child was not aware that he or she was committing an offence.

Finally, if evidence of this type is admitted to rebut doli incapax it may be necessary to seek to limit the use of the evidence to this purpose under s 136 *Evidence Act*.

Evidence of parents/ background

A common method of rebutting the presumption used to be for the prosecution to call evidence from parents, carers, guardians or family friends that can attest to the fact that the child knew that committing the alleged act was seriously wrong as opposed to naughty. Traditionally the evidence was directed at establishing that 'they have brought the child up well, taught the child the difference between right and wrong, and made sure the child is aware of the law.

Historically it was open for prosecutors to simply call parents without notice to give evidence on these issues. The introduction of provisions for service of the brief of evidence avoids the ambush aspect of this approach and provides practitioners to consider the evidence in advance of the hearing. If a statement has not been served before the hearing, an objection can be made to on that basis.

Additionally, s 18 of the *Evidence Act* provides that a parent may object to giving evidence against the child as a witness for the prosecution. The witness must take the objection and the court must satisfy itself that the person is aware of their right to object to giving evidence.

General evidence of the child's home background can be used to rebut the presumption. In *B v R* [1958] 44 Cr App R 1, a 9-year-old boy was convicted of break, enter and steal. The only evidence with respect to doli incapax was that the boy came from a respectable family and was properly brought up. The court held that the evidence of his upbringing was sufficient evidence to rebut the presumption. One of the criticisms of this approach is that a child who comes from a very poor background with limited opportunity for education, both social and formal, and with poor parental examples is more likely to avoid prosecution than a child that was brought up in a good home. However, others would argue this is the exact purpose of the presumption. It is questionable whether this case would be decided the same way since *RP*.

Each case must be approached from the subjective circumstances of the child and not the presumed normal understanding of a child of a particular age. A child who has a learning difficulty is not equal to that of a normal child. There may be cultural considerations that may also be important. For example, a child that comes from a community where there is less emphasis placed on ownership of objects may not understand that taking a bike from another child is seriously wrong. The facts and circumstances of each case, and each child, is important.

Evidence of teachers

In *C v DPP*, Lord Lowry suggested that another way to rebut doli incapax is for the prosecution to obtain evidence from a teacher who knows the child well. It is argued that teachers will have been in close contact with the child and may be in a position to provide information that assists in understanding the child's mental and moral development.

It is important to look closely at any statements from teachers. There is a world of difference between school rules and criminal liability. While a child may have an understanding of school rules it may not be appropriate to extrapolate this understanding to the wider world. Does an understanding to stay within bounds at school assist in determining whether a child understands that it is seriously wrong to sexually assault another child? The proposition that a child knows that an act is seriously wrong does not necessarily flow from what they have been taught at school.

Further, even if there is evidence that a child is taught certain things in a particular class (eg taught about consent in physical education classes), that is not in and of itself evidence that the child learnt or understood what was being taught to them. It might not even be proof that the child was necessarily present for such lessons, in the absence of school records that can establish they were.

Evidence of psychologists and psychiatrists

Evidence from psychologists and psychiatrists may assist the court on the issue of doli incapax. In *R v LMW* (unrep, 25/11/99, NSWSC) a 10-year-old was charged with manslaughter and committed to the Supreme Court for trial. Ultimately, both prosecution and defence called evidence including objective assessment of the child's cognitive capacity and an assessment by a child psychiatrist.

The decision to call evidence of this type will need to be carefully considered. The defendant obviously has the right to silence and cannot be forced to see a psychologist or psychiatrist. However, if the child had a pre-existing relationship with a psychologist or psychiatrist, it may be that there is highly relevant evidence of the psychological or developmental issues.

Alternately, the defence or prosecution may seek to obtain an assessment and report after the alleged offence. Such an approach requires the cooperation of the accused. However, practitioners should be aware that if a report is obtained by the defence, the prosecution is likely to make a request that the child also attends upon a psychiatrist or psychologist commissioned by the prosecution.

Objective testing by psychologists may give a strong indication of the child's mental and cognitive abilities at the time of testing and by extrapolation of the likely levels at the time of the alleged offence. Subjective interpretation of even standard tests may lead to inconclusive, irrelevant, and potentially prejudicial material being presented. Inevitably any assessment is conducted after the alleged offence and after the child has been charged. There is always a real risk that any subjective assessment is contaminated by the charging and court process and precludes any useful insight into the mind of the child at the time of the offence.

Concluding observations

Despite being a long and well-established legal principle, the presumption of doli incapax is not without controversy. Though some still claim it is open to abuse and should be amended[21] or abolished there is a growing campaign that the age of criminal responsibility is too low.[22]

Australia has one of the lowest ages of criminal responsibility in the world — the global average is 14 years old.[23] The United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.

On a practical level this means police have the power to arrest children from the age of 10 and makes the issue particularly relevant to the most vulnerable and disadvantaged in the criminal justice system. In Australia indigenous children are locked up at a rate 17 times the rate of non-indigenous children despite making up just 6% of the Australian population aged 10–17. Approximately 65% of the children under the age of 14 who are incarcerated in Australian detention facilities are Aboriginal or Torres Strait Islander children.

There are significant bodies of evidence to show that children between the ages of 10 and 14 are at the very early stages of development. Children aged 12 and 13 are still evolving their maturity and capacity for abstract reasoning.[24] Many children of that age are unlikely to understand the impact of their actions, or to comprehend criminal proceedings, or to understand the wrongfulness of their actions, despite the evidence that the prosecution seeks to rely upon at trial or hearing. There is abundant research to show that detention has adverse effects upon individuals, and it only serves to compound various existing issues for vulnerable children.[25]

However, in the absence of any meaningful legislative change in this area, practitioners must consider issues relating to doli incapax very carefully, even in circumstances where the charges are not serious, and even in the face of a young client who wishes to get their case “over and done with”.

As was stated in the Statement to the Council of Attorneys-General on raising the age:[26]

> Children belong in schools and playgrounds, connected to their families, communities and culture, not placed in handcuffs, held in watchhouses or locked away in prisons. Our submissions demonstrate that raising the age of criminal responsibility is a critical reform for every Australian state and territory to embrace. The evidence overwhelmingly shows that when children as young as 10 years of age are forced through a criminal legal process during their formative developmental phases, they suffer immense harm. This negatively impacts their health, wellbeing and futures.

[1] Published at https://criminalcpd.net.au/wp-content/uploads/2022/05/Doli-incapax-The-Criminal-Responsibility-of-Children-Matthew-Johnson-Rose-Khalilizadeh.pdf, accessed 7 June 2022.

[2] Barrister, Forbes Chambers.

[3] Barrister, Forbes Chambers.

[4] *R (A Child) v Whitty* (1993) 66 A Crim R 462, per Harper J.

[5] "Who Shot Mr Burns? Part II", *The Simpsons*, Season 7 episode 1, Disney–ABC Domestic Television, 17 September 1995.

[6] "Bart the Murderer", *The Simpsons*, Season 3 episode 4, Disney–ABC Domestic Television, 10 October 1991.

[7] On appeal, the Court of Criminal Appeal said that each count needed to be separately considered, and that a finding of rebuttal in relation to one count does not necessarily result in an automatic finding in relation to later counts.

[8] *RP* at [35].

[9] [1995] 2 All ER 43.

[10] ibid at [39].

[11] ibid.

[12] *RP v The Queen* (2016) 259 CLR 641 at [9].

[13] (unrep, 3/7/1976, NSWSC) McInerny J.

[14] T Crofts,"Rebutting the presumption of doli incapax" (1998) 62 *Journal of Criminal Law* 185 at 188.

[15] ibid at 187.

[16] (1993) 66 A Crim R 462.

[17] [1987] Crim LR 42.

[18] *AL* at [137].

[19] *RP* at [29].

[20] ibid.

[21] See *R v GW* [2015] NSWDC 52 per Lerve DCJ.

[22] Amnesty International, "Why we need to raise the minimum age of criminal responsibility", 25 January 2022 at www.amnesty.org.au/why-we-need-to-raise-the-minimum-age-of-criminal-responsibility/, accessed 7 June 2022. See also Australian Law Reform Commission, "Seen and heard: priority for children in the legal process", *ALRC Report 84*, 19 November 1997 at www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/, accessed 7 June 2022.

[23] Amnesty International, ibid.

[24] Australian Human Rights Commission, "The minimum age of criminal responsibility", 2021 at https://humanrights.gov.au/sites/default/files/2020-10/australias_minimum_age_of_criminal_responsibility_-_australias_third_upr_2021.pdf, accessed 7 June 2022.

[25] The Royal Australasian College of Physicians, "The health and well-being of incarcerated adolescents", 2011, Sydney at www.racp.edu.au/docs/default-source/advocacy-library/the-health-and-wellbeing-on-incarcerated-adolescents.pdf, accessed 7 June 2022.

[26] Raise the age, "CAG submissions", accessed 7 June 2022.

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